

ESTTA Tracking number: **ESTTA333229**

Filing date: **02/19/2010**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91179090
Party	Plaintiff Elgo, Inc.
Correspondence Address	Joseph A. Mandour Mandour & Associates, APC 16870 West Bernardo Drive, Suite 400 San Diego, CA 92127 UNITED STATES jmandour@mandourlaw.com, blila@mandourlaw.com
Submission	Motion to Strike
Filer's Name	Ben T. Lila
Filer's e-mail	blila@mandourlaw.com, jmandour@mandourlaw.com, kbruce@mandourlaw.com
Signature	/Ben T. Lila/
Date	02/19/2010
Attachments	Motion to Strike Elgo 02-19-10.pdf (3 pages)(11624 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 77/090,694
Published in the *Official Gazette* (Trademarks) on August 7, 2007

ELGO, INC.,)	
)	
Opposer,)	
)	
vs.)	Opposition No. 91179090
)	
SIMPLYWELL, LLC,)	
)	
Applicant.)	
_____)	

OPPOSER’S MOTION TO STRIKE DEFENDANT’S MAIN BRIEF
AND MEMORANDUM

I. MOTION

Pursuant to Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 539, Plaintiff / Opposer Elgo, Inc. hereby moves to strike Defendant SimplyWell, LLC’s Main Brief for failure to comply with 37 C.F.R. § 2.128(a)(1), as follows:

II. MEMORANDUM

A. Defendant’s Untimely Main Brief Violates 37 C.F.R. § 2.128(a)(1).

Under TBMP § 539, a late filed Main Brief may be stricken and not considered by the Board. *See Ariola-Eurodisc Gesellschaft v. Eurotone International Ltd.*, 175 U.S.P.Q. 250 (T.T.A.B. 1972) (brief filed late stricken). Under TBMP § 801.02(b) and

37 C.F.R. § 2.128(a)(1), Defendant's Main Brief must be filed no later than 30 days after the due date of the Plaintiff's Main Brief. Plaintiff's Main Brief is due 60 days after the date set for the close of the rebuttal testimony period. TBMP § 801.02(a).

In the present case, Plaintiff's Rebuttal Period expired on November 12, 2009, per the Motion to Suspend with Consent filed by Defendant SimplyWell, LLC on June 29, 2009. Plaintiff's Main Brief was due 60 days later on January 11, 2010 and Plaintiff complied with its deadline. Accordingly, Defendant's Main Brief was due 30 days later on **February 10, 2010**. Defendant's Main Brief was *not* filed by February 10, 2010, but beyond the statutory deadline on February 16, 2010. Because Defendant's Brief indisputably violates 37 C.F.R. § 2.128(a)(1), it should be stricken and not considered by the Board.

B. Defendant Failed to Timely Move for an Extension of Time to File its Main Brief.

Under TBMP § 509, any request for an extension of time must be made before the expiration of any due date. In the present case, Defendant made no such motion and improperly filed its Main Brief beyond the statutory deadline.

Plaintiff has been further prejudiced by Defendant's delay because Plaintiff did not receive service of the Brief until February 18, 2010, and now has only 4 business days to prepare its reply brief. Because Defendant failed to properly move for an extension of time before filing, no exception applies, and the Board should reject Defendant's Main Brief.

III. CONCLUSION

Accordingly and for the foregoing reasons, Opposer Elgo, Inc. respectfully requests that Defendant's Main Brief be stricken and not considered.

Date: February 19, 2010

By: s/ Ben T. Lila
Ben T. Lila
blila@mandourlaw.com
Mandour & Associates, APC
Attorneys for Opposer,
Elgo, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "OPPOSER'S MOTION TO STRIKE DEFENDANT'S MAIN BRIEF AND MEMORANDUM" has been served via first-class mail, postage pre-paid, upon the attorneys for Applicant at the following address:

Christopher M. Bikus
Husch Blackwell Sanders, LLP
1601 Dodge Street, Suite 2100
Omaha, NE 68102-1637

Dated: February 19, 2010

s/ Ben T. Lila
Ben Lila